



No. 77-533

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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JESS H. HISQUIERDO, PETITIONER

v.

ANGELA HISQUIERDO

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF CALIFORNIA

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation of November 28, 1977.

### QUESTION PRESENTED

The United States will address the question whether federal law prohibits the states from applying community property rules to a worker's expectation of receiving railroad retirement benefits.

### STATEMENT

#### A. THE RAILROAD RETIREMENT ACT

The Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp. V) 231-231t, provides a system of retirement and disability benefits for persons em-

ployed in the railroad industry. Unlike private retirement systems, which typically are supported by voluntary or contractual contributions made by employees and employers, benefits payable under the Railroad Retirement Act are financed by means of employment taxes. The Internal Revenue Service collects the employment taxes under authority of the Railroad Retirement Tax Act (26 U.S.C. (and Supp. V) 3201 *et seq.*).

To qualify for benefits under the Act, persons must meet the eligibility requirements of 45 U.S.C. (Supp. V) 231a. Subsections (a) and (b) provide primary and supplemental benefits for specified categories of railroad employees, while subsection (c) provides additional benefits to spouses of such persons. In order to qualify for the benefits, a spouse must live with the employee, receive regular contributions from the employee for support, or be entitled to support from the employee under a court order. 45 U.S.C. (Supp. V) 231a(c)(3)(i). Benefits for a spouse terminate, however, when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. (Supp. V) 231d(c)(3)(B).

The Railroad Retirement Act in most respects is modeled on the Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. (and Supp. V) 401 *et seq.*, which it displaces with respect to employment in the railroad industry. Like Social Security benefits, benefits payable under the Railroad Retirement Act are not contractual;<sup>1</sup> they are not part of the considera-

<sup>1</sup>*Ruhl v. Railroad Retirement Board*, 342 F. 2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836; compare *Flemming v. Nestor*, 363 U.S. 603, 608-611; *Weinberger v. Salfi*, 422 U.S. 749.

tion earned by an employee and are not considered to be deferred compensation. Moreover, the right to receive a benefit under the Railroad Retirement Act is never "vested," because Congress may modify or withdraw that right at any time, even after an award of an annuity has been made.<sup>2</sup> *Flemming v. Nestor*, 363 U.S. 603; *Bernstein v. Ribicoff*, 299 F. 2d 248, 251-252 (C.A. 3), certiorari denied, 369 U.S. 887; *Price v. Flemming*, 280 F. 2d 956, 959 (C.A. 3). Taxes that were properly collected will not be refunded if the payment schedules change, and there is no exact correspondence between taxes paid by or on behalf of an employee and the benefits to which he may be entitled.

Numerous sections of the Social Security Act are incorporated, either directly or by reference, into the Railroad Retirement Act. The rate of tax now paid by railroad employees to the railroad retirement system equals the rate paid by nonrailroad employees to the social security system. 26 U.S.C. (Supp. V) 3101 and 3201. One component of a person's railroad retirement annuity is computed on the basis of formulas contained in the Social Security Act. Moreover, under minimum guarantee provisions of the Railroad Retirement Act, an annuitant is assured that he will receive benefits under the Act at least as great as he would have received if all of his employment had been subject to the Social Security Act. 45 U.S.C. (Supp. V) 231b.<sup>3</sup>

<sup>2</sup> Congress substantially revised the Railroad Retirement Act in 1974, and it changes benefit schedules frequently.

<sup>3</sup> Under the financial interchange arrangement between the railroad retirement and social security systems, there is a computation

If an employee lacks sufficient railroad compensation and service credits to be eligible for benefits under the Railroad Retirement Act, his credits are transferred to the Social Security Administration, where they are treated as credits under that system. 45 U.S.C. (Supp. V) 231q. In addition, survivor benefits under the Railroad Retirement Act are paid on the basis of an employee's combined railroad retirement and social security employment credits. 45 U.S.C. (Supp. V) 231c. With respect to questions of family relationship, which are of crucial importance in determining entitlement to various benefits payable under the Railroad Retirement Act, many definitions and standards applied under that Act are the same as those applied under the Social Security Act. 45 U.S.C. (Supp. V) 231a(d).

The Railroad Retirement Act provides that railroad retirement annuities are not subject to legal process and cannot be "anticipated" (45 U.S.C. (Supp. V) 231m):

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to

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of the amount of social security benefits which railroad retirement annuitants would have received if their employment had been subject to the Social Security Act. In addition, a computation is made of the amount of taxes under the Federal Insurance Contributions Act that railroad employees would have paid if they were covered by the Social Security Act. A transfer of the difference between those two amounts then is made either to the railroad retirement system or to the social security system, depending on the system in whose favor the difference exists. 45 U.S.C. (Supp. V) 231f(c) (2).

any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated \* \* \*.

The only exception to the applicability of this rule is stated in Section 459 of the Social Security Act (42 U.S.C. (Supp. V) 659), which permits garnishment of railroad retirement benefits to satisfy an obligation for alimony or child support. A definitional statute added in 1977 provides that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95-30, Section 501(d), 91 Stat. 160, to be codified at 42 U.S.C. 662(c).

#### B. THE PRESENT PROCEEDINGS

Petitioner was employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975 and subsequently by the Los Angeles Union Passenger Terminal. Because those employers are covered by the Railroad Retirement Act, 45 U.S.C. (Supp. V) 231(a)(1), petitioner will become eligible for retirement benefits under the Act at age 60 (Pet. App. 2).

Petitioner and respondent were married in 1958. They separated in 1972, and petitioner filed a petition for dissolution of the marriage in 1975. In an interlocutory decree, the state trial court divided the parties' community property equally between them. The court held, however, that respondent had no interest

in petitioner's expectation of receiving railroad retirement benefits (Pet. App. 1-2). The state court of appeal affirmed, reasoning that the railroad retirement benefits were not contractual and that Section 231m precluded application of state community property laws (133 Cal. Rptr. 684). The court explained that "the federal law is most explicit \* \* \* [and] [t]he interest or right given the *employee* is separate and distinct from that given to the spouse or wife or widow or widower \* \* \*" (133 Cal. Rptr. at 686; emphasis in original).

The Supreme Court of California reversed (Pet. App. 1-12; 19 Cal. 3d 613, 139 Cal. Rptr. 590, 566 P. 2d 224). Starting with the general rule that "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the marriage" (Pet. App. 3), the court found no overriding contrary intent of Congress in the provisions of the Railroad Retirement Act. Although the court acknowledged that the Act prohibited assignment or anticipation of benefits, the court determined (Pet. App. 7) that "the essential purpose of section 231m [was] to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension." The court similarly rejected arguments based on the existence of a separate annuity for spouses (Pet. App. 9-10), finding no evidence that "Congress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during

marriage, both of these benefits are withdrawn upon divorce."

#### DISCUSSION

1. The decision in this case, though grounded in state property law,<sup>4</sup> also raises substantial federal questions regarding construction of the Railroad Retirement Act. Although this Court commonly has no role to play in the development of state community property law, that general rule necessarily gives way where state law conflicts with federal rights. See *Wissner v. Wissner*, 338 U.S. 655. *Wissner* held that California could not apply its community property law to insurance proceeds under the National Service Life Insurance Act, 54 Stat. 1008, because "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other" (338 U.S. at 658). The Court explained (*id.* at 659): "Whether directed at the very money received from the Government or an equivalent amount, the judgment below [upholding application of community property law] nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand."

The Supreme Court of California recognized in the present case (Pet. App. 4) that "whenever there is a conflict between a federal statute affording annuity

<sup>4</sup> Petitioner apparently contends (Pet. 2-3, 5-7), that the Supreme Court of California misunderstood that State's community property doctrines. But the state court's decision on matters of state law is authoritative (*Herb v. Pitcairn*, 324 U.S. 117), and it cannot be reviewed by this Court.

or insurance benefits and state community property laws the federal statute must prevail," but it found no provision in the Railroad Retirement Act creating such a conflict. In our view, that conclusion is incorrect. Congress included in the Act specific provisions regarding payment of benefits to a spouse and regarding assignment or anticipation of an employee's own benefits. Moreover, Congress has manifested a general intent that benefits under the Railroad Retirement Act be equivalent in most respects to benefits under the Social Security Act.

Section 231a(c)(1) of the Railroad Retirement Act provides separate benefits for a qualifying spouse during marriage to a qualifying employee (see pages 2-4, *supra*). The legislative history shows that Congress added this section to the Act, in lieu of increasing benefits for all covered employees, in recognition of the fact that employees supporting spouses as well as themselves had greater needs. At the same time, however, Congress provided that the spouse's benefit was to terminate on divorce, when the employee presumably was again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B). If divorced employees may nevertheless be compelled to pay one-half of their individual benefits (or their equivalent) to former spouses regardless of need, as the California community property law would require, the covered employees would suffer a reduction in benefits that appears to be at odds with the supportive purposes of the Act.

Congress took care in the Act to ensure that an employee's retirement benefits were not readily dimin-

ished by other obligations. Section 231m provides that annuities are not "assignable or \* \* \* subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated \* \* \*." In *Wissner* this Court found that diversion of future insurance payments under California community property law would be "in flat conflict" with a comparable (though not identical) provision in the National Service Life Insurance Act. See 338 U.S. at 659. The Supreme Court of California did not discuss this aspect of *Wissner*, and we think that the principles of that case may be controlling.<sup>5</sup>

To be sure, Congress was aware that individual railroad retirement benefits might be used to support former spouses, for the Social Security Act (42 U.S.C. (Supp. V) 659) permits garnishment of benefits to satisfy alimony or child support obligations. However, Congress specified that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement \* \* \*." Pub. L. 95-30, Section 501(d), 91 Stat. 160, to be codified at 42 U.S.C. 662(c). This clarifying provision strongly indicates that divisions of commu-

<sup>5</sup> The state court wrote that the anti-assignment provision of Section 231m was intended "to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension" (Pet. App. 7). But this does not come to grips with the essential holding of *Wissner*; under the reasoning of this Court, an anti-assignment provision prevents the spouse from *acquiring* an ownership interest in the prospect of payments.

nity property, which are not based on need and are not affected by the later death or remarriage of a spouse, should not be permitted to reduce an employee's subsistence benefits in the same manner as alimony payments. Where need is established, of course, a divorced spouse in a community property state would be entitled to receive alimony regardless of the division of community assets.

Such a distinction between alimony and community property divisions logically would be more consistent with the nonvested nature of Railroad Retirement benefits. See *Bernstein v. Ribicoff*, *supra*. Moreover, it would bring treatment of Railroad Retirement Act benefits into line with the treatment of Social Security benefits, as Congress by the close relationship between the Acts apparently has intended. See pages 2-4 *supra*. Under California law Social Security benefits are regarded as separate property. *Nizenkoff v. Nizenkoff*, 65 Cal. App. 3d 136. Although the Social Security Act does provide benefits for some divorced wives (see 42 U.S.C. (and Supp. V) 402(b)(1)), we do not believe that the absence of such a provision in the Railroad Retirement Act means that Congress intended to subject benefits for all railroad workers to division under state community property laws.

We recognize the possible hardship to divorced spouses that may arise if they are denied a community interest in Railroad Retirement Act benefits. As a general rule, "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event

of dissolution of the marriage" (Pet. App. 3). Although spouses in genuine need may be supported by alimony payments (and have recourse to garnishment proceedings if necessary), spouses of railroad workers may be at a disadvantage, at least compared to spouses of workers covered by private pension plans. Nevertheless, the Railroad Retirement Act, read in light of the principles set out in *Wissner*, *supra*, indicates that Congress sought to exclude divorced wives from sharing in railroad retirement benefits through application of state community property law.

2. Although the decision below has created serious administrative problems for the Railroad Retirement Board, it is not presently clear what the long-range consequences of the decision will be.

Since the Supreme Court of California rendered its decision in this case, the Board has been inundated with requests from California attorneys who are involved in marriage dissolution proceedings. These attorneys typically request that the Board provide them with a statement of the "value" of the employee's interest in the railroad retirement system, so that a monetary value may be assigned to the spouse's interest in that community asset. In some cases, the attorneys request a specific item of information, such as the amount of the "contributions" that the employee has paid in support of the retirement system, or the amount of the annuity that would be payable to the employee if he were eligible for a retirement benefit at the present time.

In many instances the Board is unable to provide such information. For example, the Board does not maintain any figure representing the "present value" of a railroad employee's interest in the railroad retirement system; in the Board's view there is no such value, because the benefit schedules are subject to legislative revision. Moreover, because taxes payable under the Railroad Retirement Tax Act are collected by the Internal Revenue Service and not by the Board, the Board cannot even provide a statement of the total taxes that an employee has paid.

The decision in this case also raises questions about how the community property interest of the spouse is to be enforced. Although the Board has at times been joined as a party in marriage dissolution proceedings, under the Railroad Retirement Act the Board is authorized to pay benefits only to persons who satisfy the statutory conditions of eligibility. A divorced spouse is not within that category. Moreover, 45 U.S.C. (Supp. V) 231m limits the power of a state to enforce a community property division by the usual forms of legal process. Although the Supreme Court of California indicated (Pet. App. 10-11) that problems of this sort may be resolved by awarding the spouse an equivalent amount from other community property, that solution, even if permissible (but see *Wissner v. Wissner*, *supra*, 338 U.S. at 659), is possible only when there is enough other property to divide.

It may be, therefore, that the decision in this case will cause significant continuing problems for railroad workers and the Railroad Retirement Board. On the other hand, the administrative burden on the Board may be reduced as California attorneys become more familiar with the workings of the railroad retirement system.

The importance of this decision ultimately depends on the number of person whose benefits it affects.\* California is the first State to declare that railroad retirement benefits are community property. At present the courts of appeals in Texas are in conflict on the issue. Compare *Allen v. Allen*, 363 S.W. 2d 312 (Civ. App.) with *Eichelberger v. Eichelberger*, 557 S.W. 2d 587 (Civ. App.). Although the principles that led the Supreme Court of California to conclude that railroad retirement benefits are community property may lead it to the same conclusion about social security and other federal benefits—which would involve far more people than are affected by the railroad retirement system—it has not yet done so and may never do so. Finally, the Supreme Court of California may well reconsider its position in light of the 1977 clarification by Congress of the scope of the "alimony" exception to the anti-assignment of Sec-

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\*The question presented here could arise only in states with community property statutes. No more than six states follow community property rules.

tion 231m; the new statute was not enacted until after this case had been argued in state court.<sup>7</sup>

#### CONCLUSION

In sum, we believe that the Supreme Court of California erred in holding that federal law permits the State to treat railroad retirement benefits as community property. Because it is too soon to assess the consequences of the decision, however, we do not recommend whether this Court should undertake plenary review.

Respectfully submitted.

WADE H. MCCREE, Jr.,  
*Solicitor General.*

MARCH 1978.

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<sup>7</sup> This case was argued on April 5, 1977. Pub. L. 95-30 was signed by the President on May 23, 1977, and the decision of the Supreme Court of California was rendered on July 12, 1977. The parties did not draw Pub. L. 95-30 to the state court's attention, and neither party has relied on it in this Court. Cf. *Massachusetts v. Westcott*, 431 U.S. 322 (remanding a case to a state court for further consideration in light of a federal statute not considered by it).